

⁵ See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18620-18621 ¶ 36 (1997) (39 GHz R&O).

POF licenses issued before August 1, 1996 were issued with an expiration date of February 1, 2001. POF licenses issued beginning August 1, 1996 received ten-year license terms. In addition, the Commission adopted an eighteen-month construction period for all Part 101 licenses.⁶ As a result, Part 101 licensees were required to construct and place in operation each station authorized under Part 101 within eighteen months of the initial date of license grant.⁷ Consequently, Part 101 licensees with a February 1, 2001 license expiration date had eighteen months to construct and place in operation one station per license area.

4. In 1997, the Commission adopted a renewal expectancy and modified the performance requirements for 39 GHz band microwave licensees.⁸ Specifically, the Commission required 39 GHz band licensees to demonstrate “substantial service” in its license area in connection with its application for license renewal.⁹ Although the Commission declined to exempt the incumbent 39 GHz band licensees from the “substantial service” renewal standard,¹⁰ the Commission sought to provide 39 GHz licensees with a significant degree of flexibility in meeting their performance requirement.¹¹ The Commission was concerned that an inflexible performance requirement might impair innovation and unnecessarily limit the types of service offerings 39 GHz licensees can provide.¹² Thus, the Commission determined that permitting licensees to demonstrate that they are meeting the goals of a performance requirement with a showing tailored to their particular type of operation avoids this pitfall.¹³

5. The Commission also noted that licensees must receive a reasonable amount of time to establish a viable operation, develop market plans, secure necessary financing, develop and incorporate new technology in their systems, accommodate equipment manufacturers’ production schedules and build a customer base to meet a performance requirement.¹⁴ Although the Commission rejected several proposals as restrictive, burdensome and unnecessarily limiting licensees’ service options,¹⁵ the Commission provided an example of a substantial service showing for a traditional point-to-point microwave licensee. The Commission provided a “safe harbor” example of a substantial service showing as “four links per million population within a service area.”¹⁶ Finally, the Commission noted that “any

⁶ *Part 101 R&O*, 11 FCC Rcd at 13464 ¶ 33.

⁷ *See* 47 C.F.R. § 101.63(a) (1996); *See also 39 GHz R&O*, 12 FCC Rcd at 18622 ¶ 39.

⁸ *See 39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 49.

⁹ *See* 47 C.F.R. § 101.17.

¹⁰ *See 39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 46.

¹¹ *39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 42.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 18625 ¶ 47 – 48.

¹⁵ *Id.* at 18623-24 ¶ 43 – 45.

¹⁶ We note that although the Commission did not use the exact words “safe harbor” in the 39 GHz context, we believe the Commission intended for this example to serve as an example of a “safe harbor.” This determination is consistent with similar examples the Commission has provided to licensees in other services. Amendments to Parts 1, 2, 87, and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16,934, 16951-2 ¶ 38 (2000); Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1537-38 ¶ 70; Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19,853, 19870 ¶ 34 (1998); Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5 – 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and*

(continued....)

build-out standard should be based on market population or population density because market size is a reasonable proxy for gauging the appropriate comparative levels of spectrum use.¹⁷

B. 39 GHz Renewal Applications

6. As noted above, the authorizations of POF 39 GHz band licensees expired on February 1, 2001. Renewal applications were filed within ninety days, but not later than thirty days prior to the end of the license term.¹⁸ The Division recently granted 333 renewal applications for 39 GHz band licenses that expired on February 1, 2001.¹⁹ In granting those applications, the Division considered whether the licensees satisfied the 39 GHz safe harbor example. As previously noted, the Commission provided “four links per million population within a service area” as the 39 GHz safe harbor. The Division found that the population base in some markets was substantially smaller than the one million people used by the Commission in its substantial service example. Thus, the Division deduced that substantial service was provided if the licensee was operating at least one link for each 250,000 people located within its service area.²⁰

III. DISCUSSION

7. The renewal applications discussed in this *Memorandum Opinion and Order* provide a level of service that do not meet the 39 GHz “safe harbor”. Thus, we must review the performance of each licensee in each market to determine whether the licensee has satisfied the substantial service standard. This review keeps in mind the Commission’s desire to provide the 39 GHz licensees with significant flexibility to allow the licensees to tailor their particular type of operation to satisfy the performance requirement.

8. We note that although these licensees had a five-year license term, these licensees did not have a full five years to comply with the substantial service requirement. Because the 39 GHz band substantial service rules did not take effect until April 7, 1998,²¹ these licensees had approximately thirty-four months to comply with the substantial service requirement. These licensees had less than one-third of a full ten-year license term to satisfy the substantial service requirement. Accordingly, we believe we must evaluate the substantial service submissions for these markets in light of the reduced amount of time that these licensees received to comply with the substantial service requirement.

9. Our review of the renewal applications shows that they can be divided into two categories: (1) Licensees operating at 50% or better of the Commission “safe harbor”; and (2) Licensees demonstrating significant construction. Our review of these two categories shows that the licensees are addressing the Commission’s concern that they use the spectrum to provide service to the public.²²

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Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12,545, 12660-1 ¶ 270 (1997); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10,785, 10843-4 ¶ 113 (1997).

¹⁷ *Id.* at 18624 ¶ 44.

¹⁸ See Appendices A and B. See also 47 C.F.R. § 101.13(d).

¹⁹ See Wireless Telecommunications Bureau Grants 333 Renewals in the CF Radio Service, *Public Notice*, 16 FCC Rcd 7195 (WTB 2001).

²⁰ *Id.*

²¹ Service and Auction Rules for the 38.6-40.0 GHz Frequency Band, 63 Fed. Reg. 6079 (1998).

²² See *39 GHz R&O*, 12 FCC Rcd at 18622 ¶ 39.

Consequently, we believe these licensees are responsibly developing the spectrum they have been assigned.²³

10. *Licensees operating at 50% or better of the Commission Example of Substantial Service.* The applications listed in Appendix A were filed by licensees operating within 50% of the Commission example of one link per 250,000 population. In the thirty-four months these licensees operated under the substantial service standard, they established viable operations, developed market plans, secured necessary financing, accommodated equipment manufacturers' production schedules and built a customer base in each market providing service at a level of approximately one link per 125,000 population. This level of service in such a short time demonstrates that the licensees are using the spectrum to provide service.²⁴

11. *Licensees demonstrating significant construction.* The Commission's overarching purpose behind adopting the substantial service standard for renewal was to ensure that the spectrum was being used to provide service to the public.²⁵ We believe licensees who have constructed at least ten links within their service area during the course of this shortened period have demonstrated that the licensee is making substantial use of the spectrum, as opposed to warehousing the spectrum. We note that only about 13% (71 out of 521) of the POF 39 GHz authorizations that expired on February 1, 2001 operated ten or more links. We therefore believe that, given the truncated license period these licensees were subject to,²⁶ those licensees who are operating ten or more links in their service area have demonstrated the provision of substantial service. We believe that operation of ten or more links is significant. Before adoption of the substantial service standard, 39 GHz band licensees were compliant with the performance requirements as long as the licensee operated one link in the service area within eighteen months regardless of population size.²⁷ Although these licensees only received thirty-four months to comply with the substantial service requirement, they have constructed and are operating a 900% increase in the number of facilities previously required under the Commission's rules. We believe that a rigid interpretation of substantial service in this context would be counterproductive. Clearly, these licensees are using the spectrum to provide service. Accordingly, we will grant these applications listed in Appendix B.²⁸

12. We emphasize that our decision to grant these applications is not a modification of the "safe harbor" example provided in the *39 GHz R&O*, but a recognition that the licensees received a significantly shorter period of time to comply with these standards. We note that in developing the 39 GHz substantial service standard, the Commission envisioned a flexible substantial service standard that would be inclusive as opposed to exclusive.²⁹ We believe that allowing licensees who received a truncated license term to demonstrate lower levels of service than those licensees who receive a full ten-year license term in order to meet the substantial service standard demonstrates this flexibility and is in accord with the underlying purpose of the substantial service standard set forth in the *39 GHz R&O*.

²³ *Id.*

²⁴ These licenses are listed in Appendix A.

²⁵ See *39 GHz R&O*, 12 FCC Rcd at 18622 ¶ 40.

²⁶ See para. 8, *supra*.

²⁷ See 47 C.F.R. § 101.63 (1997).

²⁸ These licenses are listed in Appendix B.

²⁹ See *39 GHz R&O*, 12 FCC Rcd at 18623 ¶ 42.

IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons set forth above, we conclude that the applicants who have filed the renewal applications listed in Appendices A and B have complied with the substantial service showing required under Part 101 of the Commission's Rules. We therefore grant these applications because we believe it will serve the public interest, convenience and necessity.

14. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) 309(a), and Section 101.17 of the Commission's Rules, 47 C.F.R. § 101.17, the applications for renewal in the common carrier microwave service contained in Appendices A and B to this *Memorandum Opinion and Order* ARE GRANTED.

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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